88-990

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

GURCHARAN DEHAL,

Petitioner,

v.

PRESTON R. TISCH, POSTMASTER GENERAL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

1. Did the trial court erroneously find that the explanation presented by the defendant and respondent to rebut the *prima facie* case of discrimination was not pretextual?

LIST OF PARTIES

The parties to the proceeding below are Petitioner, GURCHARAN DEHAL, and the Respondent, PRESTON R. TISCH, POSTMASTER GENERAL.

The Respondent before this Court is the PRESTON R. TISCH, POSTMASTER GENERAL.

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PRESTON R. TISCH, POSTMASTER GENERAL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Gurcharan Dehal, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on September 19, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is not published and is reprinted in the appendix hereto, p. 1a, *infra*.

The memorandum decision of the United States District Court for the Northern District of California (William W. Schwartzer, D.J., Frederick J. Woelflen, Chief United States Magistrate) has not been reported. It is reprinted in the appendix hereto, p. 9a, *infra*.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 19, 1988. No petition for rehearing was made and this Petition for Certiorari is filed within 90 days of September 19, 1988.

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1). The Court of Appeals for the Ninth Circuit had jurisdiction under 28 U.S.C. Section 1291 and the District Court had jurisdiction under 28 U.S.C. Sections 3131, 3143, 42 U.S.C. Section 2000e-5 and 42 U.S.C. Section 2000e-16(c).

STATEMENT OF THE CASE

Petitioner, Gurcharan Dehal, filed a complaint in this matter on May 5, 1986, in the District Court of the United States, Northern District of California, Case No. C 86 2354.

On October 2, 1986, pursuant to a stipulated order, the matter was assigned to the Chief Magistrate for all further proceedings.

On July 20, 1987 through July 21, 1987, a trial proceeded on petitioner's complaint.

On August 6, 1987, the Court filed its memorandum of opinion finding for respondent and against petitioner. Thereafter, on August 11, judgment was entered.

Thereafter, on September 4, 1987, petitioner filed his timely notice of appeal, along with appropriate fees. The matter was submitted to the Ninth Circuit Court of Appeals. On September 19, 1988, the Ninth Circuit rendered its unpublished opinion affirming the judgment of the District Court.

Petitioner was born in Punjab, India, and is a member of the Sihk religious sect. He is a citizen of the United States.

Between 1980 and 1983, petitioner was employed by the United States Postal Service at three postal facilities in the San Francisco Bay Area. The first position was with the Richmond Post Office. After two months, due to health reasons, petitioner left the Richmond Post Office and began working at the Danville Post Office in August of 1980. Petitioner's employment was terminated at the Danville office, reportedly because he could not deliver mail fast enough. Upon his termination, petitioner filed an EEOC complaint, claiming that he was discharged because of his national origin.

While EEOC proceedings were conducted concerning the termination of petitioner's position at the Danville Post Office, petitioner sought employment at the Orinda Post Office, another San Francisco Bay Area Post Office, upon the condition that he drop his EEOC claim against the Danville Post Office. In addition, the Post Office agreed to reclassify the termination from the Danville Post Office as a reassignment. It was also agreed that

petitioner's personnel record would reflect continuous employment.

The evidence indicated that problems developed regarding the Post Office's compliance with the conditions of the transfer of petitioner to the Orinda Post Office, and the settlement of petitioner's EEOC charges against the Danville Post Office. Specifically, petitioner's personnel record showed a break in service and the termination letter was not removed from petitioner's personnel record. Accordingly, petitioner wrote a letter in June of 1981, informing the Post Office that it was breaching the settlement agreement. Only after receipt of petitioner's letter was petitioner's record changed to reflect a voluntary resignation from the Danville Post Office with continuous service until the transfer.

Petitioner commenced work at the Orinda Post Office in September of 1980. During his employment at the Orinda Post Office, petitioner worked with Dennis Skuza, a fellow clerk who later became petitioner's immediate supervisor, Romiro Arosemena, petitioner's immediate supervisor, who later became the superintendent at the Orinda Post Office, Dennis Domschine, a fellow employee who was a union stewart, and Renaldo Silan, a fellow employee at the Orinda Post Office who taught petitioner various positions at the Orinda Post Office.

Each of these individuals were called as witnesses at the trial of this matter and testified about the events forming the basis of petitioner's claims of discrimination and retaliation.

According to Domschine, Arosemena, and Silan, petitioner was a good worker. Arosemena, who had performed evaluations of petitioner's work performance, testified he had no difficulty with petitioner and classified petitioner as a good employee. Indeed, Arosemena testified that he could not ever remember giving petitioner a direct order. Silan testified that he trained petitioner for certain positions and never had any problems with him resisting instructions. Domschine testified that she had no problems with petitioner and that petitioner was not considered a "low production" employee.

The only witness who did not feel that petitioner was a good worker was Mr. Skuza. Skuza testified that he was petitioner's immediate supervisor for approximately two years before petitioner left the Orinda Post Office in July of 1983. Skuza did not review petitioner's work performance. This task was left to Mr. Arosemena. Skuza testified that he was surprised to hear that Arosemena had testified that petitioner was a good performer. Although he admitted that petitioner was doing his job and that there was very few discussions about his performance, petitioner still was a poor performer. Despite the fact that he had to give petitioner only two "direct orders", one in 1981 and one in 1983, Skuza believed petitioner was a very difficult employee.

The bulk of petitioner's testimony concerned the treatment he received from Mr. Skuza. The discriminatory treatment consisted primarily of repeated disciplinary actions for trivial matters which other employees did not receive. Domschine testified that Skuza closely supervised low production employees because of Skuza's theory that low production employees were taking extensive

breaks. Yet, petitioner was not one of these low production employees. Indeed, Skuza himself recognized that he did not have constant problems with petitioner. Yet, Skuza felt compelled to scrutinize petitioner's day-to-day performance.

Petitioner testified concerning Skuza's reprimand of petitioner on returning a vehicle to the Post Office with less than half a tank of gasoline. Petitioner testified that Skuza shouted at him, berated him and when petitioner asked for the shop steward, Skuza got mad and raised his voice even louder. According to petitioner, the discussion turned into an argument from which petitioner feared physical confrontation imminent. Thus, he left the room.

Superintendent Arosemena was present during the last moments of the third formal discussion between petitioner and Skuza regarding the lack of gasoline in the postal vehicle. Arosemena testified that petitioner did not refuse to follow a direct order, that petitioner's subsequent suspension was based upon the failure to return the vehicle to the Post Office with more than half a tank of gasoline. Arosemena clearly testified that petitioner was not suspended because he disobeyed a direct order of Mr. Skuza. This was in direct contradiction to Skuza's testimony that petitioner was suspended because he did not obey Skuza's order to stay in Skuza's office during the formal reprimand.

Petitioner also testified about other instances of harassment and disparate treatment. On one particular occasion, Skuza reprimanded petitioner for not appearing at the Post Office on time, even after petitioner pointed out to Skuza he appeared at work as posted on the

schedule. Only after petitioner and Skuza reviewed the work schedule together did Skuza acknowledge that petitioner was "probably right." Later, a grievance was filed for a suspension for a similar incident, regarding a reporting time. As a result of the grievance procedure, the Post Office changed the reporting time.

Another incident involved being classified as absent without leave following a vacation. Petitioner was late upon returning from his vacation because of a serious eye infection he incurred during his vacation. Petitioner secured documentation concerning his illness, justifying an extended stay. This documentation was given to the Postmaster who in turn failed to turn the documentation over to the doctor in charge of determining whether the illness justified an extended stay. Petitioner then filed a grievance concerning his AWOL status and it was not until after he was terminated from the Orinda Post Office that petitioner's AWOL status was reversed. During the arbitration on his grievance to remove the AWOL status, Dr. Wilson testified concerning a letter from petitioner's doctor indicating that had he received the letter he would have granted petitioner's extended sick leave request.

Another incident involved petitioner being passed over for a window job at the Orinda Post Office in 1982. Petitioner testified that he was passed over for a clerk that had less seniority than him and Skuza had told petitioner the Post Office could pick anyone they wanted to pick.

Yet another incident involving Skuza occurred when Skuza was alone with petitioner at the Post Office. Skuza

gave petitioner a task which he later asserted that petitioner did not complete. During a subsequent conversation, petitioner determined that he completed the task. Yet, Skuza reprimanded petitioner for not completing his task.

The last incident involving petitioner and Skuza occurred on July 2, 1983. Prior to that date, petitioner had successfully bid for the timekeeper's position at the Orinda Post Office and had received training from Mr. Silan. July 2 was petitioner's first day as the timekeeper.

During the morning of July 2, 1983, petitioner attended to the normal tasks of the morning until approximately 8:00 a.m. At 8:00 a.m. petitioner took a 10-minute break and asked Skuza what to do next. According to petitioner, Skuza simply pointed, without saying anything, in the direction of the timekeeper's desk. Petitioner thought Skuza was pointing to the timekeeper's position and so he dutifully reported to that position and began work. During his review of timecards, petitioner came across Skuza's timecard. Petitioner found some inconsistencies in the information on the card, sought Skuza's assistance in order to make a proper evaluation of the time Mr. Skuza worked. Petitioner was told simply to put down the hours and sign the card. Petitioner returned to the timekeeper's desk and continued to work as instructed. It was then that Mr. Skuza approached petitioner from the rear and told petitioner that he wanted to see him in the superintendent's office. Petitioner followed Skuza into the superintendent's office and Skuza became very upset. Petitioner was confused and wanted to know why he was singled out for such treatment and demanded to know what mistakes and wrongs he had

committed. Thereafter Skuza reprimanded petitioner for not following Mr. Silan's instructions, doing the timecards his own way, and telling Silan how the cards should be done. Petitioner denied all these accusations.[1] At the end of the discussion between Skuza and petitioner, Skuza ordered petitioner to complete a task unrelated to the timekeeper's position. Petitioner dutifully followed the instructions and began the task. While completing his task, petitioner discussed his anxiety and belief that he was being picked on by Mr. Skuza to Janice Domschine. During this time, petitioner asked Skuza if he could make a call to the union. Skuza told petitioner "no" and directed petitioner to return to his task. While petitioner and Domschine were discussing petitioner's problems with Skuza, Skuza approached the two individuals and directed Ms. Domschine not to discuss union business with petitioner. Petitioner heard this discussion between Domschine and Skuza and became more upset. Petitioner's hands began shaking and he believed that he was going to lose consciousness. It was then according to Silan that petitioner said "I want to see a doctor." Petitioner recalled that Skuza told him he had only two choices, either to go home and bring a doctor's certificate back or to complete casing the mail, which Mr. Silan had stated was already done. Petitioner said that he was not able to go home and that a doctor or an ambulance was required. Silan recalled hearing Skuza say, "Do you want to work or don't you want to work?". It was at

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[1] Mr. Silan never testified that appellant refused instruction or instructed Mr. Silan on how to conduct the timekeeper's position. Indeed, Mr. Silan testified that there were no problems in training petitioner for the timekeeper's position.

this time that Domschine offered petitioner the opportunity to sit down and relax. Silan testified that petitioner continued to insist on seeing a doctor. Then, petitioner fell to the ground, falling on his back.

After the fall, when petitioner was being taken from the post office in an ambulance, Domschine addressed Skuza and said that certain forms were required to be filled out because it was an on-the-job injury and that petitioner would need authorization for medical treatment. According to Domschine, Skuza's response was that there would 'be no forms submitted in the matter. Skuza testified that he believed that petitioner was backed in a corner and was trying to figure a way of going home. Although he did not actually see the fall, Skuza believed very strongly that petitioner did not fall on his back. Skuza also did not admit that petitioner requested a doctor's assistance before he fell.

Petitioner sustained verifiable injuries to his back and neck and Dr. Jensen eventually determined that he was capable of returning to work on November 1, 1983. Accordingly, the Post Office scheduled petitioner's return time. At the same time, the Post Office received a recommendation from Dr. Hjortsvang, petitioner's treating psychiatrist, that petitioner should not return to the Orinda Post Office because of the harassment he was receiving. Despite the recommendations from Dr. Hjortsvang, and a letter from petitioner's counsel, the Post Office determined that petitioner would be considered AWOL and termination proceedings would begin if he did not return by November 2, 1983.

No attempts were made to assist petitioner in transferring from the Orinda Post Office, despite his repeated attempts. Mr. Arosemena testified he had no authority to transfer petitioner even with the psychiatrist's statement concerning the probable repercussions if petitioner was required to return. Thus, petitioner's employment was terminated.

Thereafter, petitioner sought employment at various other postal facilities. A few of these postal facilities called the Orinda Post Office, making inquiries about petitioner. Petitioner was not hired at any post office until April of 1986, when he was hired at the Walnut Creek Post Office, without any of his previously gained seniority.

The District Court issued its findings of fact and conclusions of law finding no *prima facie* case of discrimination or retaliation but reviewing the circumstances as if a *prima facie* case had been determined. Thereafter, the District Court determined that the explanation presented by the defendants to rebut the *prima facie* case was not pretextual and thus found in favor of the United States Postal Service and against petitioner.

On appeal, the United States Court of Appeals for the Ninth Circuit confirmed, in an unpublished opinion, the findings of fact and conclusions of law of the District Court.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Trial Court Erroneously Found That The Explanation Presented By The Respondent To Rebut The Prima Facie Case Of Discrimination Was Not Pretextual.

In *McDonald Douglas Corporation v. Green*, 411 U.S. 792 (1973), the Court outlined the procedure for analyzing claims of discriminatory treatment, including that which is necessary to establish a *prima facie* case. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983). Petitioner carries the initial burden of establishing a *prima facie* case. *McDonald Douglas*, 411 U.S. at 802. The employer then has the burden of production "to articulate some legitimate, nondiscriminatory reason" for the contested conduct. *Id.* If the employer meets the burden of production, the petitioner must then demonstrate that the employer's proffered explanation is pretextual. *Id.* at 804. In *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), this Court determined that the burden of persuasion on the issue of discriminatory intent remains with the plaintiff in a discrimination case.

The issue of discriminatory intent in Title VII cases is a question of fact. *Aikens*, 460 U.S. at 715-16; *Pullman-Standard v. Swint*, 456 U.S. 273, 289 (1982). A finding of fact cannot be disturbed on appeal unless it is "clearly erroneous". *Pullman-Standard*, 456 U.S. at 290; Federal Rules of Civil Procedure, Rule 52(a).

Citing *Zenith Corp. v. Hazelton*, 395 U.S. 100, 123 (1969), the court in *Sutton v. Atlantic-Richfield Co.*, 646 F.2d 407, 412 (9th Cir. 1981), determined that:

> "The appellate court cannot find the findings of fact [of the district court] are clearly erroneous unless 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.' "

The District Court determined that petitioner failed to prove that the Postal Service treated him in any discriminatory manner because of his national origin or for reprisals for prior complaints of discrimination. The Court of Appeals affirmed the conclusions of the trial court.

Yet, the evidence clearly suggested that petitioner was being singled out and harassed by Mr. Skuza and others during his tenure at the Orinda Post Office. The District Court accepted the Postal Service's testimony that the actions of petitioner's supervisors were within the normal guidelines and were only designed to attempt to compel petitioner to perform his duties. Yet, as testified by Domschine, Skuza had had several previous runins with petitioner, failed to follow the guidelines and maintained that petitioner was merely attempting to figure a way out of work.

It is important to note that the Court's conclusion that petitioner could not get along with his supervisors is not entirely correct. The evidence indicates that petitioner did not get along with only one supervisor, Mr. Skuza. The only other supervisor who testified during the hearings was Arosemena, the superintendent. Arosemena testified that he got along with petitioner and that petitioner's performance as an employee was good. Further, Mr. Silan, who could be considered to be an intermediate supervisor of appellant, testified that he got along very well with petitioner. Domschine testified that

petitioner was not considered a "low production" employee. The only individual who appellant could not get along with was Skuza. Skuza had a number of run-ins with petitioner which were inconsistent with his treatment of other employees. Ms. Domschine testified that Skuza treated petitioner like he treated low production employees. Yet, petitioner was not considered a low production employee. Whereas Skuza believed that petitioner was a troublemaker because of his questioning, Silan testified that petitioner asked questions in order to obtain clarification of his job responsibilities.

When all of the acts are combined with past acts of unreasonable close supervision of petitioner, the conclusion is that petitioner's supervisor was unjustifiably harassing petitioner. The record is clear that petitioner was subjected to types of treatment that other similarly-situated employees did not have to endure. And all of the other testimony by employees indicated that petitioner was being singled out by Skuza. Yet no action was taken by the Post Office to correct the treatment.

It is evident that the District Court did not consider whether the articulated non-discriminatory reasons were mere pretext for discrimination and retaliation. It is clear that given the history of Skuza's treatment of petitioner, that any other employee similarly situated would have been constructively terminated from his position. Skuza's treatment of petitioner made petitioner's employment "miserable." In light of these actions, and the fact that the Post Service had knowledge of petitioner's previous claims and had failed to abide by their agreement to purge past EEOC claims of petitioner from his personnel record, it is clearly evident that on the entire record of

evidence there is a definite and firm conviction that a mistake had been committed concerning the trial court's determination of no pretext. Despite the existence of Dr. Hjortsvang's letter and the superintendent's knowledge of petitioner's past EEOC claims, the post office maintained the position that it had "no authority" to assist in transferring appellant out of the Orinda Post Office. Yet, this is in direct conflict with the stated policy of the United States Post Office as submitted in a policy letter of the Postmaster General, dated April 6, 1979. This letter directs the management of post offices to make every effort to transfer an employee and specifically outlines the basis for assisting in the transfer of employees. Specifically, the policy letter addressed EEOC considerations and the value of the experienced Post Office worker involved. The trial court admitted that the Postmaster General's letter set out a suggested policy concerning transfers and all supervisorial postal personnel who testified were aware of this letter and its purpose. With the post office's recognized knowledge of this policy letter, and its refusal to transfer petitioner, despite clear evidence of harassment, and past EEOC claims, the articulated reasons should have been determined to be pretextual. Finding that there was no pretext is clearly erroneous.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and unpublished opinion of the United States Court of Appeals for the Ninth Circuit.

Dated: December 9, 1988

Respectfully submitted,

BUSHNELL, CAPLAN & FIELDING

RODERICK P. BUSHNELL, ESQ.
Counsel for Petitioner

APPENDIX

JUDGMENT

United States Court of Appeals
FOR THE NINTH CIRCUIT

GURCHARAN DEHAL, Plaintiff-Appellant,	)	
vs.	)	No. 87-2624
UNITED STATES POSTAL SERVICE, Defendant-Appellee.	)	DC CV 86-2354 WWS

(Filed October 13, 1988)

APPEAL from the United States District Court for the Northern District of California

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

(stamp)

Filed and entered September 19, 1988

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GURCHARAN DEHAL, Plaintiff-Appellant, v. UNITED STATES POSTAL SERVICE, Defendant-Appellee.	NO. 87-2524 D.C.# CV-86-2354-WWS MEMORANDUM* (Filed September 19, 1988)

Appeal from the United States District Court
for the Northern District of California
William W. Schwarzer, District Judge, Presiding

Submitted: September 15, 1988**
San Francisco, California

Before: CHOY, CANBY and TROTT, Circuit Judges.

Gurcharan Dehal ("Dehal") appeals from the district court's finding in favor of the United States Postal Service in his action under Title VII of the Civil Rights Act of 1964, 42 U.S.C.§ 2000e-16(c). Dehal argues that the district court: (1) applied the wrong standard to determine that he had not established a *prima facie* case of discrimination or retaliation; and (2) erroneously found that the explanation presented by the defense to rebut the *prima facie* case was not pretextual. We reject these contentions and affirm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

**This case is suitable for submission without oral argument because the legal standard is established and the result is clear. *See* Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

BACKGROUND

Dehal filed suit under 42 U.S.C. § 2000e-16(c) alleging discriminatory and retaliatory treatment by the Orinda Post Office. Dehal worked at the Orinda office from September of 1980 to July 2, 1983. He was formally terminated in November 1983. Dehal claims that he was singled out for discipline and discriminated against because of his ethnic backround[1] and in retaliation for his filing of EEOC complaints and union grievances. More specifically, he alleges that (1) several incidents involving his supervisor, leading up to and including a confrontation on July 2, 1983, and (2) his termination in November of 1983, were discriminatory and retaliatory. After a two day trial, the district court issued and opinion in which it thoroughly canvassed each of Dehal's claims in support of his allegations, and ultimately concluded that he had failed to meet his burden. Dehal appeals from that determination.

ANALYSIS

I. *The Legal Standard to Establish a Prima Facie Case*

Dehal argues that the district court failed to apply the proper test in determining that there was no *prima facie* case of discrimination or retaliation. This contention is without merit.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Court outlined the procedure for analyzing claims of discriminatory treatment, including that which

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[1] Dehal was born in Punjab, India, and is a member of the Sikh religious sect. He is a citizen of the United States.

is necessary to establish a *prima facie* case. The Court elaborated on this analysis in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983). The complainant carries the initial burden of establishing a *prima facie* case. *McDonnell*, 411 U.S. at 802. The employer then has the burden of production "to articulate some legitimate, nondiscriminatory reason" for the contested conduct. *Id.* If the employer meets that burden, the complainant must then be given the opportunity to demonstrate that the employer's proffered explanation is pretextual. *Id.* at 804. The burden of persuasion on the issue of improper discriminatory intent "remains at all times with the plaintiff."[2] *See Burdine*, 450 U.S. at 253.

The model outlined in *McDonnell* for the determination of whether a plaintiff established a *prima facie* case is not to be applied rigidly. *See Burdine*, 450 U.S. at 253 n.6; *Foster v. Arcata Associates*, 772 F.2d 1453, 1460 (9th Cir. 1985), *cert. denied*, 475 U.S. 1048 (1986). However, Dehal's argument fails for a more basic reason. Although the district court questioned whether he established a *prima facie* case, it went on to evaluate his claims as if he had. That is, the court reviewed the Postal Service's explanations for the challenged actions.

Further "[w]here the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, *whether the plaintiff really*

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[2] The same burdens of persuasion and proof apply to claims of retaliatory conduct. *See Ruggles v. California Polytechnic State University*, 797 F.2d 782, 784 (9th Cir. 1986).

did so is no longer relevant."[3] *Aikins*, 460 U.S. at 715 (emphasis added). At this point, any presumptions "drop out," and the court must determine, as a factual matter, whether the challenged action was discriminatory or retaliatory within the meaning of Title VII. *See id; see also Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 875 (1984) ("ultimate question" is whether employment decision made on basis of race). To prevail, the plaintiff must ultimately prove discriminatory or retaliatory intent. *See Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1409 (9th Cir. 1987).

The procedure outlined in *McDonnell* "is merely a sensible, orderly way to evaluate the evidence in light of common experience." *Aikens*, 460 U.S. at 715. At the close of the evidence at trial, the district court "ha[d] before it all the evidence it need[ed] to decide whether 'the defendant intentionally discriminated against the plaintiff.'" *Id.* (quoting Burdine, 450 U.S. at 253). After a two day trial, the district court concluded that the Postal Service did not intentionally discriminate or retaliate against Dehal. The presence or absence of a *prima facie* case is thus irrelevant.

II. *District Court's Conclusion of no Violation*

Dehal's second argument is that the district court erred in its conclusion that the Postal Service articulated

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[3] The employer meets this intermediate burden if he or she "produce[s] admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." *Burdine*, 450 U.S. at 257.

legitimate nondiscriminatory reasons for the challenged actions. In effect, Dehal challenges the court's ultimate finding of no Title VII violation.

The burden of proof regarding intentional discrimination or retaliation remains with the plaintiff at all times. *See Burdine,* 450 U.S at 253. The issue of discriminatory intent is a question of fact. *See Aikens,* 460 U.S. at 715-16; *Pullman-Standard v. Swint,* 456 U.S. 273, 289 (1982). Thus we will not disturb the district court's finding unless it is "clearly erroneous." *See Pullman-Standard,* 456 U.S. at 290; Fed. R. Civ. P. 52(a). "An appellate court cannot find that findings of fact are clearly erroneous unless 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.'" *Sutton v. Atlantic Richfield co.,* 646 F.2d 407, 412 (9th Cir. 1981) (quoting *Zenith Corp. v. Hazeltine,* 395 U.S. 100, 123 (1969)). We are particularly deferential to findings based on the credibility of witnesses. *See id.*

The district court thoroughly reviewed the facts and testimony surrounding the events leading to and including July 2, 1983, and the ultimate termination of employment in November 1983. The court concluded that Dehal had failed to prove that the Postal Service treated him as it did because of his national origin and color, or in reprisal for prior complaints of discrimination.[4]

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[4] The court correctly held that Dehal was barred from arguing that his ultimate termination was because of his national origin and color. His administrative complaint only alleged reprisal for having filed earlier administrative complaints. *See Lowe v. City of Monrovia,* 755 F2d 998, 1003 (9th Cir.

(Continued on following page)

We find no error in this conclusion. The court concluded, after a two day trial in which it could evaluate the credibility of the various witnesses, that Dehal was not subjected to discriminatory or retaliatory treatment in the events leading to and including July 2, 1983. The court acknowledged that there was a personality conflict between Dehal and his immediate supervisor, but correctly held that such conflicts were beyond the scope of Title VII. *See Sutton*, 646 F.2d at 410. The court accepted the Postal Service's testimony that the actions of Dehal's supervisor on July 2 were within ordinary guidelines, and were only an attempt to compel Dehal to perform his duties.

The court similarly accepted the Postal Service's testimony that the Orinda Postmaster terminated Dehal in November 1983 because of his refusal to return to work, and the Postmaster's good faith belief that he lacked the authority to effectuate a transfer. The court concluded that even if that belief was in error, the evidence did not support the allegation of a racial or retaliatory motivation. Indeed, Dehal's allegations are generally void of any specific facts that could lead a reasonable fact finder to the conclusion that he was singled out for disparate treatment, or that the Postal Service's proffered explanations for his treatment were pretextual. *See Burdine*, 450 U.S. at 258 (plaintiff must demonstrate that similarly

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(Continued from previous page)

1985)(district court lacks subject matter jurisdiction to hear Title VII claims not raised before the EEOC), *as amended*, 784 F2d 1407 (1986).

situated employees were not treated equally). The district court's conclusion is by no means clearly erroneous.

AFFIRMED.

A TRUE COPY
ATTEST OCT 11, 1988
CATHY A. CATTERSON
Clerk of Court
by Oscar Tegle
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GURCHARAN DEHAL, Plaintiff, v. PRESTON R. TISCH, Postmaster GENERAL, Defendant,	)	NO. C-86-2354 WWS(FW) MEMORANDUM OF OPINION (Filed August 6, 1987)

This is a Title VII action brought by plaintiff, Gurcharan Dehal. By agreement of counsel, the issues of damages and attorney's fees were bifurcated from the underlying issue of liability.

Mr. Dehal was born in Punjab, India, and is a member of the Sikh religious sect. He was educated in India and has a college degree in Mathematics and Physics. He taught school in India before coming to this country in 1959. Plaintiff is a citizen of the United States.

Between 1980 and 1983 plaintiff was employed by the United States Postal Services at various postal facilities in the San Francisco Bay Area. Plaintiff was first employed at the Richmond City Post Office. He resigned from the Richmond City Post Office. He resigned from the Richmond Post Office approximately two months later because the work environment affected his lungs. In August 1980, plaintiff became employed as a letter carrier at the Danville Post Office. He was terminated after five weeks because he delivered the mail too slowly and

could not complete his route on time. Following his termination from Danville, plaintiff filed an EEOC complaint claiming he was discharged based on his national orgin. Plaintiff testified he believed the Danville Postmaster would not have been so quick to terminate an employee of different ethnicity. While this grievance was pending, plaintiff sought employment at the Orinda Post Office. Resolution of the Danville EEOC matter was a condition of plaintiff's employment at Orinda, and a settlement of the Danville complaint was reached. Plaintiff withdrew his complaint with the understanding his records would indicate he resigned from Danville, rather than being terminated. Plaintiff was also to receive full credit for leave and benefits with the showing of continuous service. Problems developed regarding the Post Office's compliance with all the conditions of the Dehal settlement. The Court does not consider these problems germaine to the issues raised n the plaintiff's action currently before it, however.

Plaintiff commenced work in the Orinda office in September 1980; he last worked in that facility on July 2, 1983. He was formally terminated by letter from the Orinda Post Office in early November 1983.

The genesis of plaintiff's present action is his claim that his termination from the Orinda office was due to discrimination against him because of his ethnic background. He charges and has testified he was singled out for disciplinary action because of his ethnic background and further in retaliation for his filing of EEOC complaints or union grievances on which on two occasions he prevailed.

The first incident which plaintiff alleges indicates discrimination involves a fellow employee who criticized the manner in which plaintiff ate his meals at the Orinda facility. Plaintiff complained about this to the Postmaster, Mr. McDaniels, and Superintendent, Ramiro Arosemana. Insofar as the record at trial discloses, either the Postmaster or Mr. Arosemana took the criticizing employee to task and thereafter plaintiff was not the subject of remarks about his eating habits. We find this is a single isolated incident which, stand alone, could not be the basis for any finding of ethnic discrimination.

The next incident which plaintiff claims establishes a pattern of discrimination against him involves refilling of the gas tanks of Post Office vehicles.

During plaintiff's employment at the Orinda Post Office there was a standard and specifically stated policy that any employee who used a Postal vehicle and returned it to the facility with the gas gauge reading less than one-half (1/2) a tank of gasoline in the vehicle was to refill the vehicle at a nearby government contract gas station. On three occasions over a two or three month period in 1982 plaintiff returned his vehicle to the Orinda Post Office with the tank less than one-half full. On the first two occasions, plaintiff was warned by his supervisor, Dennis Skuza, and reminded of the gas tank policy. No letters of warning were issued, for if they had, plaintiff would have been subject to a discriplinary hearing. At trial plaintiff asserted he was being singled out and complained other employees left the gas tanks less than half full and yet were not disciplined. There was no direct evidence on this issue. Neither plaintiff nor defendant offered any evidence that other emloyees at the Orinda

Office who failed to comly with this gas tank policy were or were not subject to a formal "in office" discussion relative to their disregard of this policy.

In September 1983, plaintiff was the subject of a third formal office discussion relating to the gas tank policy. This was his third in a three month period. Dennis Skuza testified plaintiff had returned a vehicle on empty and had not refilled it with gas. The discussion between Skuza and plaintiff was somewhat heated and plaintif became upset. Skuza was not pleased with plaintiff's attitude and firm in his instructions to Dehal. During this meeting plaintiff walked out. He was first asked by Skuza to return to the office; plaintiff refused. Skuza then gave plaintiff a "direct order" to return. Plaintiff ingnored this direct order and suspension folowed. Plaintiff filed a grievance with the Equal Employment Opportunity Commission and the Commission later set aside the two day suspension. It did not however grant him the wages lost because of the suspension.

Plaintiff next complained of another dispute between plaintiff and the officials at the Orinda Post Office. In the Fall of 1982 plaintiff took an extended vacation trip to his native India. While in India, plaintiff became ill with an eye infection. He was treated by a doctor in India. He overstayed his projected leave and upon his return requested he be allowed three weeks sick leave. The Post Office required plaintiff be examined by a Post Office doctor, Dr. Wilson. At that time plaintiff had a report from the doctor who treated him in India, which described the nature of his illness. Dr. Wilson found the infection could have been cleared up in one week, and requested plaintiff to obtain more information from the

Indian doctor. Plaintiff did secure additional information from the doctor in India. He submitted the second report to the Orinda Postmaster, Mr. McDaniels, requesting him to forward it to Dr. Wilson. McDaniels did not forward it to Dr. Wilson and Thereafter the Post Office issued a letter of warning finding the plaintiff was absent without leave and denying him two weeks of sick leave. Plaintiff filed a grievance regarding this warning letter; it was not until after the letter of termination was given to plaintiff in November 1983 that the grievance procedure was resolved. The arbitrator reversed the Post Office's letter of warning and granted plaintiff the remaining two weeks requested.

Plaintiff raises another incident he contends supports his allegation of discrimination by the Post Office. When plaintiff was hired at the Orinda Post Office he was classified as PTF (Part Time Flexible). This allowed an adjustment in plaintiff's regular work hours so as to be available to fill in work slorts for other employees who came in early in the morning and left in midafternoon. During employment, a position of Window Clerk opened at the Orinda Post Office. Selection was not based upon seniority. The main qualifications were the candidate's ability to deal with the public, some financial background (ability to make change), and availability to take over the afternoon shift. Anyone could apply. Superintendants made the recommendations: the Postmaster made the selection. Plaintiff applied for the window position, but he was not selected. He contends the Postmaster's choice of a less senior employee for the window position indicates discrimination. We do not agree. Mr. Skuza explained that when a PTF employee applies for this

position, consideration has to be given to the eventual permanent status of that employee, which would result in one less flexible employee available. Mr. Skuza explained an employeee with the most amount of PTF employment would be more likely selected because he would be available the longest for rotation service. An employee with less PTF employment would be less likely considered; and therefore a more senior PTF employee may be passed over in favor of a less senior PTF. There is nothing in this record to indicate plaintiff's failure to get the window clerk job was the result of any discrimination by the management, supervision, or personnel of the Orinda Post Office.

We now address the incident of July 2, 1983 which culminated in the institution of this law suit. It is referred to as the "timekeeping incident."

Prior to July 2, 1983, plaintiff had bid for and had been selected for the Timekeeper's job at the Orinda Post Office. The Timekeeper's duties included reviewing the time cards of postal employees.

On the morning of July 2, 1983, Skuza and plaintiff arrived at work about 5:00 a.m. This was plaintiff's first day as Timekeeper. Until about 8:00am plaintiff was "working the mail" for distribution. Plaintiff testified he approached Skuza after finishing his mail distribution for orders as to what to do next. Plaintiff asserts Skuza pointed to the timekeeper's desk and plaintiff therefore went to the desk and proceeded to work on the time cards. Skuza testified however he did not order plaintiff to work on the time cards but rather to "case" the mail. Skuza asserts that upon seeing plaintiff at the

timekeeper's desk, instead of casing mail as ordered, he asked plaintiff to step into his office for a discussion. The discussion apparently became heated and plaintiff was very upset. Plaintiff claims Skuza was yelling at him and plaintiff feared a physical confrontation may develop. Plaintiff left the office; Skuza called him back. About the same time, plaintiff requested to talk to a Union Shop Steward. He wanted a witness to what he perceived was Skuza's unjustified behavior toward him. Skuza denied plaintiff's request to immediately see a shop steward, explaining to the court that such an immediate meeting with a shop steward is not required by the union contract. Skuza instructed plaintiff to return to the "box section." Plaintiff returned to the box section but Skuza observed plaintiff immediately approaching a shop steward. Skuza approached plaintiff and the shop steward, Janice Sutton (now Janice Domschine), and told them union business could not be discussed at that time. He suggested they meet in the early afternoon. At this point, plaintiff became very agitated and upset. Plaintiff requested a doctor; he said he was feeling very ill. Skuza told him he could go home and see a doctor or continue work. Skuza suggested plaintiff take a break and sit down for a while. Plaintiff, however, collapsed to the floor. Witnesses testified plaintiff did not lose consciousness; plaintiff however claims he has no recollection of what happened until he awoke on the ambulance. Plaintiff was breathing heavily and was taken to a nearby hospital where he was hospitalized and released several hous later. As a result of his fall, plaintiff sustained injuries to his neck and back. He was placed on disability and his treating doctor found him no fit for duty until

November 1983. While on disability, plaintiff sought the assistance of a psychiatrist, Dr. Hjortsvang. The doctor suggested that due to plaintiff's reaction to the Orinda work environment, plaintiff should not return to the Orinda Post Office but should rquest a transfer to another office. At the hearing, Dr. Hjortsvang described plaintiff as a man with a strong ego who likes himself very much and does not easily accept criticism. The doctor's recommendation, along with a letter from plaintiff's counsel, was sent to the Orinda Post Office. The letter from counsel indicated a transfer would be necessary to avoid potential legal action against the Orinda Post Office considering what may occur if plaintiff were to return there and be confronted with similar incidences.

Once the officials at the Orinda Post Office became aware that the doctor had determined plaintiff physically fit to return to duty on November 1, 1983, Mr. Arosemana called the plaintiff to schedule his hours upon his return. At the time, plaintiff told Arosemana he was able to work but was not coming back to work at Orinda. He said his doctor did not think it wise for him to return to Orinda. About the same time, Mr. Amosemana received Dr. Hjortsvang's letter recommending a change in work location. Plaintiff and Mr. Arosemana discussed transfer to another postal facility. Mr. Arosemana testified plaintiff knew the procedures to be followed in order to be transferred. Arosemana claimed neither he nor the Orinda Postmaster had the authority to transfer plaintiff. After this telephone conversation, Arosemana sent a letter to plaintiff notifying him he was to be terminated as of November 1, 1983.

Plaintiff filed EEOC complaints relating to the July 2, 1983 incident claiming ethnic discrimination and retaliation.[5]

Following his termination at Orinda, plaintiff sought employment at various other Postal facilities. He was eventually hired by the Concord Post Office in April, 1986, where he is presently employed.

The subject of retaliation centers around the alleged refusal of Postal officials, particularly at the Orinda Post Office, to assist the plaintiff in securing a transfer to another facility. Plaintiff asserts the Postal officials should have considered the findings of plaintiff's treating psychiatrist that to return to work at Orinda would not be beneficial and most likely adverse to Mr. Dehal's mental well being.

Admittedly, there is by way of evidence a policy letter from the Postmaster General dated April 6, 1979, which directs that management should make every effort to transfer an employee. It is the plaintiff's position this directive from the Postmaster General's letter was violated when the management at the Orinda Post Office refused to assist him in transferring to another Post Office and forced him to return to work on November 1, 1983 at a time that his returning to such a facility would be contrary to his psychiatrist's advice and recommendation. Plaintiff asserts this refusal was motivated by ethnic

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[5] It may be worthy to note that Mr. Arosemana is an American citizen of Filipino descent.

discrimimination and in retaliation for his having instituted EEOC claims and grievance proceedings against the Post Office.

The Postmaster General's letter does set a suggested policy concerning transfers. All supervisory postal personnel who testified in this case were aware of the letter and its purpose. All personnel did however testify that in order to carry out the intent of the letter, certain procedures had to be followed by the party seeking the transfer. First of all the party wanting to transfer did not go to his or her present Postmaster. The party applied to the Postmaster (or the office) of the postal facility to which he or she wished to be transferred. Thereafter, the employee's personnel file, particularly the leave record, was reviewed by the Postmaster at the Post Office where the transfer was to be made. Should that Postmaster agree to the transfer, it could only be effected if the employee's current Postmaster agreed, the current Postmaster considering what personnel changes would be required by such a transfer.

In the case at hand, the Postal authorities assert it was not up to the Orinda Postmaster to start the transfer requested by the plaintiff. The various post offices plaintiff applied to for employment were required to first make a decision to hire plaintiff and if this was reached, to ask for the consent of his then or former Postmaster.

The evidence in this case is vague as to whether at any time after his termination any Post Office official at any of the facilities to which plaintiff sought a transfer agreed to hire plaintiff, let alone contacted the Postmaster at Orinda for his consent to such a transfer. We cannot

find nor does the evidence lend support to plaintiff's claim that his inability to secure a transfer or be hired by any of the Post Offices to which he filed applications for employment after November 1, 1983 was the result of racial discrimination or retaliation.

In order to recover in this action under Title VII of the Civil Rights Act of 1964, plaintiff was required to prove the Postal Service treated him as it did because of his national origin and color or in reprisal for prior complaints of discrimination. 42 U.S.C., § 20003-16(c); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Hagans v. Clark*, 752 F.2d 477, 480-481 (9th Cir. 1985); *Kauffman v. Sidereal Corp.*, 695 F.2d 343, 344-345 (9th Cir. 1982). The critical issue in this case was the Postal Sercice's motive for its actions. *Teamsters v. United States Postal Service*, 431 U.S. 324, 335-336 n.15 (1976). Proof of discriminatory motive on the part of the Postal Service is essential to plaintiff's action. *Douglas v. Anderson*, 656 Fed. 528, 531 (9th Cir. 1981). This critical issue is one of fact, to be determined by this court as are other ultimate questions of fact. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716 (1983); *Lowe v. City of Monrovia*, 775 F.2d 998, 1006-1007 n.6 (9th Cir. 1985).

Personality conflicts as we find to have existed between plaintiff and his fellow employees, particularly Dennis Skuza, do not amount to violations of Title VII. *Sutton v. Atlantic Richfield Co.*, 646 F.2d 407, 410 (9th Cir. 1981); *McCollum v. Bolger*, No. 85-8680, Slip Op. at 4486 (11th Cir. 1986). A Title VII plaintiff is not entitled to prevail even if an employer misjudged his qualifications, *Burdine*, 450 U.S. at 259; *Douglas v. Anderson*, 656 F.2d 528, 533 n.5 (9th Cir. 1981); *Milton v. Weinberger*, 696 F.2d 94,

99-100 (D.C. Cir. 1982); *Graefenhain v. Pabst Brewing Co.*, 620 F.Supp. 696, 703 (E.D. Wis. 1985).

As a preliminary matter plaintiff was required to establish a prima facie case of discrimination. *Lowe*, 775 F.2d at 1005; *Kauffman*, 695 F.2d at 344-345. The prima facie case standards are flexible and are to be modified to fit the facts of each case. *Foster v. Arcota Associates, Inc.*, 772 F2d 1453, 1460 (9th Cir. 1985) *cert. denied*, 106 S.Ct. 1267 (1986), *Douglas*, 656 F.2d at 532. Plaintiff alleges, among other things, that the Postal Service violated Title VII on July 2, 1983, by refusing him access to a shop steward and a physician, and by generally harassing him. In order to establish a prima facie case of discrimination, plaintiff was required to prove facts "sufficient to raise an inference of discrimination. . . ." *Foster*, 772 F.2d at 1460. The Court finds plaintiff failed to raise such an inference concerning his claim that the incident of July 2, 1983 was related to his color or national origin. In order to raise such an inference, plaintiff was required to demonstrate that an employee of difference ethnicity *"in similar circumstances"* was afforded better treatment than was he. *Nix v. WLCY Radio*, 738 F.2d 1181, 1187 (11th Cir. 1984). Plaintiff has wholly failed to make such a showing. Instead, plaintiff contended merely that he deserved better treatment. We find the incident of July 2, 1983 arose out of an ongoing personality conflict between plaintiff and his immediate supervisor, Dennis Skuza. This is beyond the ambit of Title VII, "Title VII address *discrimination*. . . . Title VII is not a shield against harsh treatment at the work place." *Nix*, 738 F.2d at 1187. While concluding the plaintiff failed to establish a prima facie case of ethnic discrimination in connection with the events of

July 2, 1983, the Court is cognizant of the Supreme Court's direction in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983), that once the defendant's case has been heard, the trial court is to decide the ultimate issue of discrimination in light of all the evidence. Therefore, the Court makes additional conclusions of law concerning the events of July 2, 1983.

Plaintiff asserts the events of July 2, 1983 were occasioned by his earlier administrative complaints of discrimination. To establish a prima facie case of retaliation, plaintiff was required to establish that Skuza knew plaintiff had filed prior complaints and that there was a causal link between the challenged treatment and the earlier complaints. *Clemente v. United States Postal Service*, 766 F.2d 1358, 1366 n.11 (9th Cir. 1985), *cert. denied*, 106 S.Ct. 881 (1986). The Court concludes plaintiff may have established a weak prima facie case of retaliation concerning the events of July 2, 1983, since Skuza was aware of plaintiff's prior complaint. As explained below, however, the Postal Service amply rebutted this weak prima facie showing.

Even if the court could find and conclude plaintiff established a prima facie case of ethnic discrimination or retaliation in connection with the events of July 2, 1983, plaintiff cannot prevail. In response to the plaintiff's establishing a prima facie case, it is the defendant's obligation to articulate some legitimate non-discriminatory reason for the challenged treatment. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The defendant's burden is merely one of production, not persuasion; the plaintiff retains the burden of proof at all times. *Burdine*,

450 U.S. at 253-254. The court finds plaintiff had problems getting along with his supervisors and became upset on July 2, 1983 when given a direction by supervisor Skuza to perform his duties. As previously stated, personality conflicts are beyond the ambit of Title VII and may rebut any prima facie case of retaliation or discrimination. *Sutton v. Atlantic Richfield Co.*, 646 F.2d 407, 410 (9th Cir. 1981); *McCollum v. Bolgar*, No. 85-8680, Slip Op. at 4486 (11th Cir. 1986). The defendant's evidence demonstrated plaintiff was not denied access to the shop steward, but rather, was not allowed to see one immediately upon demand. A meeting was set up that very same day by Skuza. The testimony of Skuza and the shop stewart, Janice Sutton Domschine, clearly establishes that employees generally are not allowed to see stewards on demand. The union contract so states. Therefore, defendant's evidence shows plaintiff was not treated disparately when he was denied immediate access to a shop steward. Finally Skuza did not harass plaintiff on July 2, 1983. Skuza's actions on that date were an attempt to have plaintiff perform his duties.

Plaintiff additionally contends his removal from the Post Office was the product of retaliation and further was issued because of his national origin and color. Plaintiff cannot now litigate his removal claims on the basis of national origin and color discrimination because his administrative complaint only charges he was removed in reprisal for having filed earlier administrative complaints of discrimination. *Lowe v. City of Monrovia*, 775 F.2d 998, 1093 (9th Cir. 1985). Even if plaintiff could litigate these additional claims, however, they are without merit.

Plaintiff would want the court to conclude the alleged discriminatory conduct of his superisor on July 2,

1983 caused him to become so ill as to prevent his return to the Orinda post office. Plaintiff further claims his failure to receive a transfer from Orinda was retaliatory and discriminatory. these arguments fail because the Court has found plaintiff failed to prove supervisor Skuza discriminated against plaiintiff on July 2, 1983. Absent such a finding there is no nexus between plaintiff's purported inability to return to Orinda and nay discriminatory conduct on the part of Skuza.

Plaintiff admits that prior to his removal, his counsel and psychiatrist informed the Postal Service that although plaintiff was physically able to work on November 1, 1983, his return to Orinda would likely cause him psychological harm. The Postal Service relied upon these reports. See, *Cook v. Department of Labor,* 688 F.2d 669, 670 (9th Cir. 1982). Plaintiff, however, contends he was denied a transfer to another post office in retaliation for his earlier complaints. Plaintiff probably has stated a weak prima facie case of retaliation, since Mr. Arosemana was aware of plaintiff's prior complaints when he decided to discharge plaintiff. *Clemente v. United States Postal Service,* 766 F.2d 1358, 1366 n.11 (9th Cir. 1985), *cert. denied,* 106 S.Ct. 881 (1986). As the court has previously found on the issue of discrimination, however, any such prima facie of retaliation that plaintiff may have proved was amply rebutted by Arosemana's testimony that he did not possess the authority to have plaintiff transferred to another office. In light of the Postmaster General's policy letter of 1979, Arosemana may have been incorrect regarding his authority. Even if he had been in error, however, such an error would not establish discrimination. Title VII does not require a "correct" decision. *Douglas,* 656 F.2d at 533 n.5. "While an employer's judgment

may seem improper or erroneous to outsiders, the relevant question is simply whether the given reason was pretext for discrimination." *Clay v. Hyatt Regency Hotel*, 724 F.2d 721, 725 (8th Cir. 1984), *citing*, *Loeb v. Textron, Inc.*. 600 F.2d 1003, 1012 n.6 (1st Cir. 1979). Indeed, as the finder of fact, this court "only had to determine whether [Arosemana] in good faith *believed*" that he was without authority to transfer plaintiff. *Graefenhain v. Pabst Brewing Co.*, 620 F.Supp. 696, 703 (E.D. Wis. 1985). Arosemana acted in such good faith in removing plaintiff.

We conclude as a matter of fact and law the evidence offered by the defense in rebutting any prima facie case established by plaintiff on the issue of discrimination and retaliation or reprisal was not pretextual.

The court hereby finds in favor of defendant PRESTON R. TISCH, Postmaster General and against plaintiff GURCHARAN DEHAL.

Counsel for defendant is to prepare a Judgment in accordance with this Opinion.[6]

DATED: Aug 6, 1987

/s/ Frederick J. Woelflen
FREDERICK J. WOELFLEN, Chief
United States Magistrate

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[6] The issue of liability having been resolved in favor or the defendant, the resolution of damages becomes moot.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GURCHARAN DEHAL, Plaintiff, v. PRESTON R. TISCH, Postmaster General, Defendant.	Civil No. C-86-2354-WWS(FJW) *JUDGMENT* (Filed August 11, 1987)

In accordance with the Memorandum Of Opinion entered by the Court herein, it is hereby ORDERED, ADJUDGED and DECREED that judgment is in favor of defendant Preston R. Tisch, Postmaster General and against plaintiff Gurcharan Dehal.

DATED: AUG 11, 1987

/s/ Frederick J. Woelflen
FREDERICK J. WOELFLEN
Chief, United States Magistrate